

FEDERAL CIRCUIT COURT OF AUSTRALIA

*MOYA v MINISTER FOR IMMIGRATION &
ANOR*

[2018] FCCA 2156

Catchwords:

MIGRATION – Review of decision by Administrative Appeals Tribunal – whether Administrative Appeals Tribunal’s decision affected by jurisdictional error – whether the Administrative Appeals Tribunal misapplied the relevant law – whether the Administrative Appeals Tribunal failed to give genuine, proper or realistic consideration to the applicant’s claims – whether the Administrative Appeals Tribunal’s findings were legally unreasonable or lacked a sufficient logical or evidentiary basis – no jurisdictional error – dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5CB, 5F, 31 65, 257A, 338, 359A, 359AA, 360, 474, 476

Migration Regulations 1994 (Cth), regs.1.09A, 1.15A, 2.01, sch.1, sch.2 cls. 309.211, 309.221

Treaties:

Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), Art 1A

Protocol Relating to the Status of Refugees, opened for signature 31 January 1967 (entered into force 4 October 1967)

Cases cited:

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

Craig v South Australia (1995) 184 CLR 163

Minister for Immigration & Citizenship v Li (2013) 249 CLR 332

Minister for Immigration & Border Protection v Singh (2014) 231 FCR 437

Minister for Immigration & Border Protection v Stretton (2016) 237 FCR 1

Minister for Immigration & Border Protection v Eden (2016) 240 FCR 158

Minister for Immigration & Border Protection v SZVFW (2017) 248 FCR 1

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611

Minister for Immigration and Citizenship v SZRKT (2013) 212 FCR 99

Minister for Immigration and Border Protection v MZYTS (2013) 230 FCR 431

Khan v Minister for Immigration and Ethnic Affairs (1987) 14 ALD 291

SZVAP v Minister for Immigration & Border Protection (2015) 233 FCR 451

Minister for Immigration and Border Protection v SZVFW [2018] HCA 30

SZJEH v Minister for Immigration & Citizenship [2007] FCA 1706

SZSHV v Minister for Immigration & Border Protection [2014] FCA 253

Associated Provincial Picture House Limited v Wednesbury Corporation [1949]

1 KB 223

Applicant:	MONICA MOYA
First Respondent:	MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 3371 of 2016
Judgment of:	Judge Emmett
Hearing date:	19 July 2018
Date of Last Submission:	26 July 2018
Delivered at:	Sydney
Delivered on:	16 August 2018

REPRESENTATION

Counsel for the Applicant:	Mr Jay Williams (By direct access)
Counsel for the Respondents:	Mr Greg Johnson
Solicitors for the Respondents:	Sparke Helmore

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 3371 of 2016

MONICA MOYA

Applicant

And

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application pursuant to s.476 of the *Migration Act 1958* (Cth) (“**the Act**”) for judicial review of a decision of the Administrative Appeals Tribunal dated 26 October 2016 (“**the Tribunal**”), dismissing an application for review by the Tribunal of a decision of a delegate of the first respondent (“**the Delegate**”) made on 9 October 2018 refusing Mr A (“**the Visa Applicant**”) a Partner (Provisional) (Class UF) (Subclass 309) visa (“**Partner Visa**”). The applicant in the matter before this Court was the Visa Applicant’s sponsor (“**the Review Applicant**”).
2. Prior to considering the proceeding before this Court, these Reasons provide the relevant procedural background, a summary of the

legislative framework, a summary of the decision of the Delegate, and a summary of the Tribunal's review and decision.

Background

3. The Visa Applicant applied for the Partner Visa on 15 January 2013 on the basis of his relationship with the Review Applicant. The Visa Applicant is a citizen of Colombia, where he currently resides. The Review Applicant is an Australian citizen.
4. The Visa Applicant arrived in Australia on a three month tourist visa on 25 April 1997. On 28 April 1997, he applied for a protection visa. The application for a protection visa was refused, and subsequently refused again on appeal in 2003.
5. The Visa Applicant remained in Australia illegally until 2012, at which time he left Australia voluntarily.
6. On 15 January 2013, the Visa Applicant and the Review Applicant lodged an application for a Partner Visa with the then Department of Immigration and Citizenship ("**the Department**").
7. On 9 October 2015, the Delegate refused the parties' application for a Partner Visa.
8. On 17 November 2015, the parties lodged an application for review of the Delegate's decision by the Tribunal.
9. On 26 October 2016, the Tribunal handed down its decision affirming the decision of the Delegate not to grant a Partner Visa.
10. On 30 November 2016, the Review Applicant filed an application in this Court seeking judicial review of the Tribunal's decision.

Legislative framework

11. Pursuant to s.65(1)(a) of the Act, if satisfied of a number of matters, the first respondent may grant a visa. Section 65(1)(b) of the Act provides that, if the first respondent is not satisfied about those matters, then the Minister must refuse to grant the visa.

12. Section 31(1) of the Act provides that there are to be prescribed classes of visa. One class of visa is a Partner (Provisional) (Class UF) visa (reg.2.01 of the *Migration Regulations 1994* (Cth) (“**the Regulations**”) and sch.1 to the Regulations).
13. At the time of the visa application the subject of review, Class UF contained only one subclass: subclass 309. The criteria for the grant of this visa are set out in Part 309 of sch.2 of the Regulations.
14. Relevantly to this matter, the primary criteria for the grant of the Partner Visa are set out at cl.309.211(1)-(3) of sch.2 of the Regulations, as follows:

“309.211 Criteria to be satisfied at time of application

309.211

(1) The applicant meets the requirements of subclause (2) or (3).

(2) The applicant meets the requirements of this subclause if the applicant is the spouse or de factor partner of:

(a) an Australian citizen; or

(b) an Australian permanent resident; or

(c) an eligible New Zealand citizen.

(3) The applicant meets the requirements of this subclause if:

(a) the applicant intends to marry:

(i) an Australian citizen;

(ii) an Australian permanent resident; or

(iii) an eligible new Zealand citizen; and

(b) the intended marriage will, if it takes place, be a valid marriage for the purposes of section 12 of the Act.

Note: If the applicant is an applicant referred to in subclause 309.211(3), the marriage must have taken place before the applicant can be granted a visa of this subclass: see clause 309.244.”

15. Section 5CB of the Act defines “*de facto partner*” and “*de facto relationship*” for the purposes of partner visa applications, as follows:

“De facto partners

(1) For the purposes of this Act, a person is the de facto partner of another person (whether of the same sex or a different sex) if, under subsection (2), the person is in a de facto relationship with the other person.

De facto relationship

(2) For the purposes of subsection (1), a person is in a de facto relationship with another person if they are not in a married relationship (for the purposes of section 5F) with each other but:

(a) they have a mutual commitment to a shared life to the exclusion of all others; and

(b) the relationship between them is genuine and continuing; and

(c) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis; and

(d) they are not related by family (see subsection (4)).

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

Definition

(4) For the purposes of paragraph (2)(d), 2 persons are related by family if:

(a) one is the child (including an adopted child) of the other; or

(b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or

(c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.”

16. Regulation 1.09A of the Regulations sets out arrangements for determining whether a person or relationship is ‘de facto’ in accordance with s.5CB of the Act:

“De facto partner and de facto relationship

(1) For subsection 5CB(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB(2)(a), (b), (c) and (d) of the Act exist.

Note 1: See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2: The effect of subsection 5CB(1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB(2) sets out conditions about whether a de facto relationship exists, and subsection 5CB(3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

(2) If the Minister is considering an application for:

(a) a Partner (Migrant) (Class BC) visa; or

(b) a Partner (Provisional) (Class UF) visa; or

(c) a Partner (Residence) (Class BS) visa; or

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) the living arrangements of the persons; and

(iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and

(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and

(iii) any basis on which the persons plan and undertake joint social activities; and

(d) the nature of the persons' commitment to each other, including:

(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together; and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long-term one.

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3)."

17. Spouse is defined at s.5F of the Act as follows:

"Spouse

(1) For the purposes of this Act, a person is the spouse of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a married relationship if:

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

Note: Section 12 also affects the determination of whether the condition in paragraph (2)(a) of this section exists."

18. Regulation 1.15A of the Regulations provides a framework for determining whether a person satisfies the definition of ‘spouse’ set out at s.5F of the Act:

“Spouse

(1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or*
- (b) a Partner (Provisional) (Class UF) visa; or*
- (c) a Partner (Residence) (Class BS) visa; or*
- (d) a Partner (Temporary) (Class UK) visa;*

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) *the living arrangements of the persons; and*
(iii) *any sharing of the responsibility for housework; and*

(c) *the social aspects of the relationship, including:*

(i) *whether the persons represent themselves to other people as being married to each other; and*

(ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*

(iii) *any basis on which the persons plan and undertake joint social activities; and*

(d) *the nature of the persons' commitment to each other, including:*

(i) *the duration of the relationship; and*

(ii) *the length of time during which the persons have lived together; and*

(iii) *the degree of companionship and emotional support that the persons draw from each other; and*

(iv) *whether the persons see the relationship as a long-term one.*

(4) *If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3)."*

19. Under s.338 of the Act, a decision to refuse to grant a Partner Visa is a decision which may be reviewed by the second respondent.
20. The requirements of the natural justice hearing rule are exhaustively stated in Division 5 of Part 5 of the Act (s.357A of the Act). Division 5 Part 5 includes ss.359A and 360, which provide that:

"359A Information and invitation given in writing by Tribunal

(1) Subject to subsections (2) and (3), the Tribunal must:

(a) give to the Applicant, in the way that the Tribunal considers appropriate in the circumstances, clear

particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review.

360 Tribunal must invite Applicant to appear

(1) The Tribunal must invite the Applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.”

21. Section 359AA of the Act permits the Tribunal to give orally to an applicant clear particulars of any information that the Tribunal considers would be the reason or part of the reason for affirming the decision under review. The Tribunal must ensure that the applicant understands the relevance of the information and the consequences of any information being relied upon. The Tribunal must also invite the applicant to comment on or respond to the information and advise the applicant that the applicant may seek additional time to comment on or respond to the information.
22. However, a purported decision of the second respondent which is affected by jurisdictional error is not a decision which is made under the Act and therefore is not a privative clause decision (see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476).

The Delegate's decision

23. On 9 October 2015, the Delegate refused the parties' application for a Partner Visa on the basis that the Visa Applicant did not satisfy cl.309.211(1) of sch.2 of the Regulations.
24. In accordance with the matters set out in regs.1.15A and 1.09A of the Regulations, the Delegate considered the financial aspects of the relationship; the nature of the household; the social aspects of the relationship; and the nature of the parties' commitment to each other.
25. In respect of the financial aspects of the relationship, the Delegate found that there was no evidence to suggest that the parties' had made any joint purchases or shared any past, current or ongoing financial responsibilities. The Delegate accepted that couples may decide to keep their finances separate, but found that this was not such a case. The Delegate found the parties' lack of financial commitment toward one

another to be demonstrative of a lack of commitment to the relationship. The Delegate considered that the financial arrangements that the Visa Applicant held with the Review Applicant were not consistent with having a spousal or de facto relationship.

26. In respect of the nature of the parties' household, the Delegate considered their domestic living arrangements and found that no evidence had been provided that the Visa Applicant and the Review Applicant were living together as a couple, sharing a household and the responsibilities of a household, despite the parties' claiming to have lived together from 2005 to 2009.
27. The Delegate concluded that overall, there was limited evidence that the parties presented themselves as a married couple to family or the wider community, that they undertook regular joint social activities, or that they had taken holidays together or attended significant events together.
28. In assessing the nature of the parties' commitment to one another, the Delegate considered the circumstances of their meeting, relationship development, length of time they had lived together, the degree of companionship and emotional support that they drew from one another, and whether they viewed their relationship as a long-term one.
29. The Delegate noted that the Visa Applicant and Review Applicant claim to have known each other since 2002 and were married on 12 October 2012. The Delegate noted that a marriage certificate had been provided and accepted that the parties' were lawfully married. However, the Delegate found that despite being married, the supporting evidence provided was limited and inconsistent with the claimed duration of the relationship.
30. Having considered all the information and evidence provided by the Visa Applicant in relation to the matters prescribed under regs.1.15A and 1.09A of the Regulations, the Delegate considered that it was insufficient to demonstrate that the Visa Applicant was the spouse or de facto partner, as defined under ss.5F and 5CB of the Act, of the Review Applicant. The Delegate found that the Visa Applicant did not meet the requirements of cls.309.211(2) or (3) of sch.2 of the Regulations and thus did not meet the requirements of cl.309.211(1) of sch.2 of the

Regulations. Accordingly, the Delegate found that the Visa Applicant did not meet the time of application criterion set out in cl.309.211 of sch.2 of the Regulations, and thus did not meet the criteria for the grant of a Partner Visa.

The Tribunal's review and decision

31. On 17 November 2015, the Review Applicant lodged an application for review of the Delegate's decision by the Tribunal.
32. On 4 April 2016 the Review Applicant's representative submitted additional evidence in support of the application for review, including various letters as proof of address, statutory declarations, a medical report in respect of the Review Applicant's father, a series of photographs of the Visa Applicant and Review Applicant together, and records of communication between the Visa Applicant and Review Applicant over the instant messaging application *Viber*.
33. On 19 August 2016, the Tribunal wrote to the Review Applicant informing her that the Tribunal had considered the material before it but was unable to make a favourable decision on that material alone. The letter invited the applicant to attend a hearing on 12 September 2016 to give oral evidence and present arguments.
34. On 7 September 2016, the Review Applicant's representative submitted additional evidence to the Tribunal for consideration, including receipts of money transfers, a character reference, statements by friends and family, call logs from the instant messaging application *Whatsapp*, medical information in respect of the Review Applicant and her parents, wedding photos of the Review Applicant and the Visa Applicant, and receipts for joint purchases.
35. On 12 September 2016, the Review Applicant attended the Tribunal hearing and gave evidence. On 6 October 2016 the Review Applicant attended a further Tribunal hearing. The Review Applicant was represented on both occasions by her registered migration agent. The Tribunal also received oral evidence from two witnesses and from the Visa Applicant at the hearing on 12 September 2016, and further evidence from the Visa Applicant at the hearing on 6 October 2016.

36. The Tribunal noted that it had before it the Department's file, the Delegate's decision record and other materials available to it from a range of sources.
37. The Tribunal accepted the validity of a Marriage Certification dated 7 September 2014, which stated that the marriage of the Visa Applicant and the Review Applicant took place on 12 October 2012. The Tribunal found that the parties were married to each other and that the marriage was valid for the purposes of s.5F(2)(a) of the Act. To establish whether the parties were in a married relationship that satisfies s.5F of the Act, the Tribunal referred to the guideline criteria in reg.1.15A of the Regulations.
38. The Tribunal noted that the parties claimed to have lived together at the Review Applicant's home in a de facto relationship from 2005 to 2009, and to have dated for a few years prior to 2005. At the time the Visa Applicant departed Australia for Colombia in mid-2012, the parties were not in a relationship, but intended to marry if the Visa Applicant could obtain a divorce from his first wife. The parties claim that the Visa Applicant proposed to the Review Applicant by phone in August 2012, finalised his divorce from his first wife on 9 October 2012 and married in Chile on 12 October 2012. At the time of lodging the Partner Visa application, the parties had been married for three months and spent three days together in Chile as a married couple.
39. In relation to the financial aspects of the Visa Applicant and Review Applicant's relationship, the Tribunal noted that though the parties claimed to have shared bills and jointly purchased household items during the time they lived together, no receipts were provided in support of those claims. The Tribunal found that, given the lack of information provided at the time of application and in lieu of any other compelling evidence, it was not satisfied that the parties had established the financial relationship that would be expected in the circumstances, given the length of the claimed relationship.
40. In considering the social aspects of the Visa Applicant and Review Applicant's relationship, and their commitment to one another, the Tribunal noted that no further information had been provided to address the concern expressed by the Delegate regarding the lack of detail surrounding the meeting of the Visa Applicant and Review

Applicant and when they claimed their relationship began. The Tribunal noted that none of the statutory declarations of friends and family submitted in support of the visa application or review addressed the period during which the parties claim to have not been in a de facto relationship, from 2009 to 2012. The Tribunal concluded that either the declarants did not know about the parties' two year separation, or chose not to mention it. The Tribunal found that if the declarants were good friends and family of the Review Applicant, then they would know that she was in a relationship with another man from 2010 to 2012. Accordingly, the Tribunal placed limited weight on the declarations as they lacked detail and specific information and dates about when the parties were in a relationship.

41. The Tribunal noted that at the time of application, the parties had spent approximately six weeks together in person when the Review Applicant travelled to Colombia and then Chile. The Tribunal noted statutory declarations made by two of the Review Applicant's friends which state that they travelled to Colombia and Chile with her and attended the wedding. The Tribunal noted photos of the wedding and accepted that the declarants did travel as claimed and attended the wedding.
42. The Tribunal accepted that the Visa Applicant and Review Applicant knew each other very well and had been variously in a relationship with each other and very good friends, but did not accept that the parties' had, at the time of application, demonstrated that they were committed to sharing a life together to the exclusion of all others. The Tribunal was not satisfied, on the evidence, that the relationship at the time of application was genuine and continuing.
43. The Tribunal found that the Visa Applicant and Review Applicant's relationship commenced in 2012 when the parties claimed to have become engaged. The Tribunal found that this relationship could not be said to be continuing from the earlier claimed relationship which ended in 2009.
44. For the reasons outlined above, the Tribunal found that s.5F(2)(b)-(d) of the Act was not satisfied and that the parties did not, at the time of application, demonstrate that they had a mutual commitment to a shared life to the exclusion of others, that the relationship was genuine

and continuing, and that they lived together and not separately and apart on a permanent basis. The Tribunal was not satisfied that either at the time of the visa application, nor at the time of its decision, the parties were in a spousal relationship.

45. Accordingly, the Tribunal determined that the Visa Applicant did not satisfy the relevant criteria in cls.309.211 and 309.221 of sch.2 of the Regulations and affirmed the decision under review refusing the Visa Applicant a Partner Visa.

Section 359AA information

46. The Tribunal noted that a “*dob-in*” was received by the Department and that this information was put to the Review Applicant at the first Tribunal hearing under s.359AA of the Act as material that the Tribunal considered would be the reason, or a part of the reason, for affirming the decision under review. The Review Applicant was given the opportunity to respond to the information at hearing or to have the hearing adjourned and provide responses at a later time. The Review Applicant opted to respond orally at the hearing.
47. The Visa Applicant had the same information put to him at the second Tribunal hearing. He also elected to respond orally at the hearing and did not seek additional time to respond in writing.
48. The Visa Applicant and Review Applicant provided responses and documents to refute the allegations contained in the *dob-in*, and the Tribunal considered, was satisfied with and accepted the responses and explanations given by the parties refuting the allegations. Accordingly, the Tribunal placed no weight on the “*dob-in*” or the content of it.

The proceeding before this Court

49. The Review Applicant was represented before this Court by Mr Jay Williams, of counsel.
50. On 30 March 2017, the Review Applicant given leave to file and serve an Amended Application giving complete particulars of each ground of review relied upon, together with any further evidence by way of affidavit, including any transcript of the Tribunal hearing, as well as submissions in support.

51. At the outset of the hearing, leave was granted to the Review Applicant, by consent, to rely on the Amended Application filed on 9 July 2018.
52. The grounds of that Amended Application are as follows:

“Ground 1: Jurisdictional error

1. The decision by the Tribunal was affected by jurisdictional error as the Tribunal either misapplied the relevant law, failed to give genuine, proper or realistic consideration to the claims of the applicants or there was an insufficient logical or evidentiary basis for the Tribunal to find at [56] that “s.5F(2)(b)-(d) is not satisfied and the parties did not, at the time of application, demonstrate that they had a mutual commitment to shared life to the exclusion of others, that the relationship was genuine and continuing and that they lived together or not separately and apart on a permanent basis”.

Particulars

The application

a) At [11] of the decision record, the visa applicant is a sixty two year-old man who is citizen of Colombia, where he currently resides. At [12] of the decision record, the visa applicant arrived in Australia on a three month tourist visa on 25 April 1997. Three days later, he applied for a protection visa. This was refused and the matter was resolved with a further refusal on appeal in 2003. However, the visa applicant did not leave Australia, but continued to stay as an illegal non-citizen until 2012, at which time he left Australia voluntarily.

b) The visa applicant’s wife (the review applicant) is an Australian citizen by grant since 1983. This is the review applicant’s second marriage and she also had a de facto relationship between the marriages. The review applicant is 61 years of age and has two adult daughters from her first marriage, which ended in 1994. The review applicant entered a de facto relationship with [Mr C], a Chilean citizen, who the review applicant met in Sydney in 1994, a partner visa was granted in 1997 with the current review applicant as his sponsor, their relationship ended two years later, in 1999. There were no children from the relationship.

c) At [13] of the decision record, the parties met at the Marconi Club in 2002, commenced a relationship and started living together at the home of the review applicant in 2005. They continued to live together until 2009 when the review applicant became frustrated with the inability of the visa applicant to be free to marry her because he was still married to his first wife in Colombia. They ended the relationship, however the visa applicant continued to live at the home of the review applicant, even though she was in a relationship with someone else from 2010 to 2012, [Mr E].

d) At [14] of the decision record, the visa applicant voluntarily left Australia in 2012, having presented himself to the Department in Parramatta and offering to leave without penalty or being taken into detention, which was agreed to by the Department. The visa applicant returned to Colombia on 4 June 2012, proposed to the review applicant in August 2012 and was divorced from his first wife on 9 October 2012.

e) At [15] of the decision record, the review applicant travelled to Colombia on 3 September 2012 to marry the visa applicant. However, she discovered she did not have the required paperwork that stated she was free to marry in Colombia and so the parties travelled to Chile and to be married in a small ceremony including two friends of the review applicant on 12 October 2012. The review applicant returned to Australia a few days after the wedding. At [16] of the decision record, on 15 January 2013, the parties lodged a partner visa application, which was refused by the Department in its decision dated 9 October 2015. An application for review was lodged with the Tribunal on 17 November 2015.

The statutory provisions

f) At [2] of the decision record, the visa applicant applied for the visa on 15 January 2013 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (Cth). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include clause 309.211(1), that the visa

applicant meets the requirements of the subclauses 309.211(2) and 309.211(3), and in this matter is the spouse of or intends to marry an Australian citizen.

g) At [8] of the decision record, the Tribunal observed that clause 309.211(2) and 309.221 require that at the time the visa application was made and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who was granted Australian citizenship on 8 September 1982. A Certificate of Australian Citizenship was provided and was accepted as legally valid by the Tribunal.

The definition of the term “spouse”

h) At [9] of the decision record, the term “spouse” is defined in section 5F of the Migration Act 1958 (Cth) and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Migration Act 1958 (Cth), there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together or not live separately and apart on a permanent basis: section 5F(2)(a)-(d) of the Migration Act 1958 (Cth). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant’s and review applicant’s household and their commitment to each other as set out in regulation 1.15A(3) of the Migration Act 1958 (Cth), which is extracted in the attachment to the decision.

The marriage

i) At [10] of the decision record, the Tribunal observed that a “Marriage Certification dated 7 September 2014 under the hand of [Ms JJ], Consular Officer, stating that the marriage of the parties took place on 12 October 2012 was provided to the Tribunal” and that the “Tribunal has no reason to question its authenticity.” On the evidence, the “parties were married to each other under a marriage that is valid for the purposes of the Migration Act 1958 (Cth) as

required by section 5F(2)(a) of the Migration Act 1958 (Cth)."

The financial aspects of the relationship

j) However, the Tribunal misapplied the relevant law, or the findings were affected by unreasonableness or the Tribunal failed to give genuine, proper or realistic consideration to the financial aspects of the relationship at [23] of the decision record. The evidence before the Tribunal was the parties had been living together at the home of the review applicant in a de facto relationship from 2005 to 2009 and had dated for a few years prior to 2005. Further, at the time the visa applicant departed for Colombia in mid 2012, the visa applicant was still married and was attempting to obtain a divorce from his first wife. That is why the parties did not provide to Tribunal any historical joint financial statements. a reasonable explanation for the Tribunal's findings at [25]. At [26] of the decision record, the parties provided the Tribunal with "copy of the Settlement Adjustment Sheet for the sale of a property purchased from the review applicant, dated 31 August 2012. Whilst this property was in the name of the review applicant only and the settlement monies were paid to her, the Tribunal was incorrect to conclude that "this does not add any weight to joint financial arrangements at time of application, as it is not in joint names." The Tribunal observed at [27] of the decision record, that the "oral evidence given by the parties at the Tribunal hearings, that the review applicant stated she has savings of about \$50,000 and the visa applicant has no savings. Further, the Tribunal observed that the visa applicant stated that he has no money but that thought his wife had approximately \$120,000 and they plan to buy a house together and use her money as a deposit. The Tribunal erred by finding that there was "[n]o documentary evidence... provided to confirm either of the parties' estimates." This was plainly wrong. As a consequence, the Tribunal was not satisfied that the "parties have had open and detailed discussions about the financial situation of the review applicant and their future plans." To the contrary, the review applicant and the visa applicant provided a reasonable explanation regarding the financial aspects of the relationship at [23] of the decision record. The Tribunal therefore erred at [28] of the decision record by finding that "[a]t the time of application, and based on a lack of information provided at that time and in lieu of any other

compelling evidence regarding the situation at the time of application, the Tribunal [was] not satisfied that the parties have established a financial relationship that would be expected in the circumstances, given the length of the claimed relationship.”

The social aspects of the relationship and the commitment to each other

k) Similarly, the Tribunal misapplied the relevant law, the findings were affected by unreasonableness or the Tribunal failed to give genuine, proper or realistic consideration to the claims by the review and visa applicants with regard to the social aspects of the relationship and the commitment to each other. At the time of the application, the parties provided indisputable evidence of their relationship from [30] (a) to (e) of the decision record. The Tribunal erred by finding at [31] of the decision record that the “four statutory declarations provided at the time of application... all provide support for the relationship up to 2009, and say the parties are now genuinely married and happy, but none mention or address the period during which the parties on their own evidence say that they were not in a de facto relationship from 2009 to 2012, the period immediately preceding the departure of the visa applicant from Australia and their marriage a few months later, in December 2012.” Accordingly, at [32], the Tribunal erred by placing ‘limited weight on the statutory declarations as they lack detail and specific information and dates about when the parties were in a relationship.’ Further, the Tribunal erred at [33] of the decision record by accepting on the one hand that “the photos show the parties in social situations with some friends and family in Australia,” however erred by finding on the other, that “this evidence does not add weight to the claim that the parties were in a relationship at the time of application.” The findings by the Tribunal are especially troubling given the Tribunal’s own findings at [34] that “two of the review applicant’s friends say they travelled to Colombia and Chile with her and attended the wedding. There are photographs of the wedding and the Tribunal accepts that they did travel as they say and attend the wedding.”

Information and documents provided at the first and second Tribunal hearing

l) The Tribunal also misapplied the relevant law, or the findings were affected by unreasonableness or the Tribunal failed to give genuine, proper or realistic consideration to the claims by the review and visa applicants with regard to “information and documents” provided at the first and second Tribunal hearings from [35]-[43] of the decision record. At [35] a number of statements were provided in support of the relationship at the first hearing. The Tribunal accepted at [36] the statement as evidence of the review applicant’s residential arrangements at the time. At [37], the Tribunal accepted the statutory declaration of [Ms D] dated 14/03/2016 and “acknowledged that she travelled to Colombia with the review applicant and attended the wedding in Chile.” At [38], the Tribunal accepted the statutory declaration of [Ms M], dated 2016 and “acknowledged that she attended the parties’ wedding in Chile, however misapplied the relevant law or acted unreasonably or did not give proper consideration to the claims of the applicants by finding that “but apart from this, it does not include any other information that was relevant to or supported the relationship at the time of application.” The applicants also provided from [39](i) to (iv) further evidence of the relationship, including proof of address, a doctor’s report, photographs and viber communications. At [40], a large volume of material was received on 7 September 2016, 63 pages in total. They were receipts for money transfers, centrelink statements, character references, a statement by the review applicant’s mother, the statement by [Ms M] was given minimal weight without explanation, the statement by [Ms D], dated 5 September 2016, but not signed was “not relied on” as the Tribunal “could not verify who wrote the statement,” however the Tribunal purportedly did not accord “any negative weight”, whereas the statement by [Ms D] on 3 September 2016 was “given some weight”; the statement by [Ms G] dated 6 September 2016 was given weight for the confirming the parties ended their relationship in 2010, with the statement by [Mr J], [Ms B], [Mr M], [Mr B], [Ms J] were all given limited weight without and reasons. Receipts and itineraries for travel were provided and accepted by the Tribunal. Call logs from Whatsapp were provided but given limited weight without reasons. The review applicant provided a mental health treatment program, which was accepted by the Tribunal. Wedding photos in 2012 were accepted by the Tribunal and that [Ms M] attended the wedding in Chile. Receipts of purchases were provide not accepted as evidence

establishing a household or joint financial commitments. More documents were provided to the Tribunal prior to the second hearing on 6 October 2016 at [41] (i) to (vii).

m) In light of the foregoing, there was no logical or evidentiary basis for the Tribunal to find:

i. at [44], the Tribunal has concluded, on the evidence, that for the period 2009 to 2012 the parties declared themselves to family and friends as friends but not as being de facto partners before the visa applicant left Australia. At the time of application, there was little evidence provided to support the claim that the parties had presented themselves socially to other people as being in a married relationship since the time of their engagement, other than some photos of a wedding that was only attended by a few people and statements of two friends who attended the wedding and the statements of the parties.

ii. At [45], the Tribunal found that “the statutory declarations in support of the relationship are non-specific with regard to the times that the parties were and were not in a de facto relationship between 2002 and 2012.”

iii. At [46], the Tribunal found that “there is little, if any, evidence that the parties were in a relationship for the two years before the visa applicant left Australia and in fact the parties do not claim to have been in a relationship other than one of friendship at that time.”

iv. At [47], the Tribunal found “there was no evidence supplied that attests to the relationship during this period that can lead to a finding that the parties had declared that they were in a committed and exclusive relationship that they viewed as long term.”

v. At [48], the Tribunal found that “[w]hilst it is accepted that the parties know each other very well and have been variously in a relationship with each other and very good friends, the Tribunal does not accept that the parties had, at the time of application, demonstrated that they were committed to a shared life together to the exclusion of all others.”

vi. At [49], “[t]he Tribunal is not satisfied, on the evidence, that the relationship at the time of application was genuine and continuing. When the parties married in 2012, they sought to rely on the previous claimed cohabitation from 2005 to 2009 as evidence that they were in a genuine and continuing relationship in 2012. At the time of application, the parties had not provided any reliable evidence that they were in a genuine and continuing relationship since from the time the visa applicant departed Australia on 4 June 2012. From 2009 the parties were not in a relationship and therefore the relationship that commenced in 2012 when the parties say they became engaged cannot be said to be continuing from the earlier claimed relationship which ended in 2009.”

vii. At [50], “[t]he Tribunal is not satisfied that the parties, at the time of application, had presented themselves as being in a married relationship satisfying s.5F of the Act.”

The nature of the household

i) At [51] of the decision record, the Tribunal observed that at the time of application the parties had provided little evidence of substance that they were living together as a couple or sharing the responsibilities of a household. There were statements in the form of statutory declarations that the parties lived together from 2005 to 2009 and did things such as cooking together and that the visa applicant helped the review applicant around the house. Some weight is given to the statements in support of the shared household from 2005 to 2009 at the apartment owned by the review applicant, at times with her daughters. However, no further information has been provided to the Tribunal in the form of documentary evidence that the parties had established a household at the time of application.

j) There was an insufficient logical or evidentiary basis for the Tribunal to find at [52] of the decision record that at the time of application, the parties had not provided enough evidence to satisfy the Department that there was any relationship between them from the period 2009 to 2011. Department that there was any relationship between them from the period 2009 to 2011. The Tribunal erred by finding that at the time of application the parties were not in a

married relationship that satisfied section 5F of the Migration Act 1958 (Cth).

Other relevant considerations

k) At [53] of the decision record, the Tribunal observed that a “dob-in was received by the Department and this was put to the review applicant at the first hearing as a section 359AA matter and she was told that it was information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision under review. The review applicant was asked if she wished to respond at the hearing or would like the hearing adjourned to provide responses at a later time and elected to respond orally at the hearing.” At [54] of the decision record, the visa applicant had the same matters put to him at the second hearing. The parties provided responses and documents to refute the allegations contained in the dob-in and the Tribunal considered, was satisfied with and accepted the responses and explanations given by the parties refuting the allegations and placed no weight on the dob-in or the contents of it.

Jurisdictional error

l) The Tribunal must be satisfied that the parties were in a married or defacto relationship at the time of application and the time of decision. If they are found not to be in a married relationship satisfying section 5F of the Migration Act 1958 (Cth) at the time of application then the Tribunal must affirm the Department’s decision. Based on the evidence and information provided to the Tribunal, the Tribunal ultimately erred at [56] of the decision record by finding that “s.5F(2)(b)-(d) is not satisfied and the parties did not, at the time of application, demonstrate that they had a mutual commitment to shared life to the exclusion of others, that the relationship was genuine and continuing and that they lived together or not separately and apart on a permanent basis.”

53. (Emphasis in original)

54. At the heart of the Review Applicant’s complaints is a contention that there was an insufficient logical or evidentiary basis for the Tribunal to find that the parties were not in a genuine relationship. The Review Applicant’s counsel, Mr Williams, characterised the error as a failure to give genuine, proper or realistic consideration to the claims of the Review Applicant, misapplication and legal unreasonableness.

55. The jurisprudence is relatively settled in relation to those alleged errors. In his written submissions, Mr Williams summarised the relevant case law as follows:

Case law – misapplication of the relevant law

3. *In Craig v South Australia (1995) 184 CLR 163, per Brennan, Deane, Toohey, Gaudron and McHugh JJ., at 179 observed that when considering what constitutes "jurisdictional error", it is necessary to distinguish between, on the one hand, the inferior courts which are amenable to certiorari and, on the other, those other tribunals exercising governmental powers which are also amenable to the writ. e*

The position is of course, a fortiori in this country where constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal. If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question. to ignore relevant material, to rely on irrelevant material or, at least in some circumstances. to make an erroneous finding or to reach a mistaken conclusion and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

Case law - legal unreasonableness

4. *There are now many expositions of what is comprehended by the proposition that an exercise of power, including an exercise of discretionary power, is legally unreasonable: see Minister for Immigration & Citizenship v Li [2013] HCA 18 249 CLR 332; Minister for Immigration & Border Protection v Singh [2014] FCAFC 1; 231 FCR 437; Minister for Immigration & Border Protection v Stretton [2016] FCAFC 11; 237 FCR 1; Minister for Immigration & Border Protection v Eden [2016] FCAFC 28; 240 FCR 158.*

5. *In Minister for Immigration & Border Protection v SZVFW [2017] FCAFC 33, the Full Court comprising of Griffiths, Kerr and Farrell JJ., at [38] recently summarised the guiding principles regarding legal unreasonableness referring to these authorities.*

[38] The following general principles may be extracted from the three leading authorities referred to immediately above (further general guidance is provided by the Full Court's decision in Minister for Immigration and Border Protection v Eden [2016] FCAFC 28 ; 240 FCR 158):

- there is a legal presumption that a statutory discretionary power must be exercised reasonably in the legal sense of that word (Li at [63] per Hayne, Kiefel and Bell JJ; Singh at [43] per Allsop CJ, Robertson and Mortimer JJ; Stretton at [4] per Allsop CJ and at [53] per Griffiths J);*
- nevertheless, there is an area within which a decision-maker has a genuinely free discretion, which area is bounded by the standard of legal reasonableness (Li at [66]; Stretton at [56] per Griffiths J);*
- the standard of legal reasonableness does not involve a court substituting its view as to how a discretion should be exercised for that of a decision-maker (Li at [66]; Stretton at [8] per Allsop CJ) and [76] per Griffiths J);*
- the legal standard of reasonableness is not limited to what is in effect an irrational, if not bizarre, decision and an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified (Li at [68]);*
- in determining whether in a particular case a statutory discretion has been exercised unreasonably in the legal sense, close attention must be given to the scope and purpose of the statutory provision which confers the discretion and other related provisions (Li at [74]; Stretton at [62] and [70] per Griffiths J);*
- legal unreasonableness “is invariably fact dependent” and requires a careful evaluation of the evidence. The outcome of any particular case raising unreasonableness will depend upon an application of the relevant principles to the relevant circumstances, rather than by way of an analysis of factual similarities or differences between individual cases (Singh at [48]; Stretton at [10] per Allsop CJ and at [61] per Griffiths J);*
- the concept of legal unreasonableness can be “outcome focused”, such as where there is no evident and intelligible justification for a decision or, alternatively, it can reflect the*

characterisation of an underlying jurisdictional error (Singh at [44]; Stretton at [12]–[13] per Allsop CJ);

- *where reasons are provided, they will be the focal point for an assessment as to whether the decision is unreasonable in the legal sense and it would be a rare case to find that the exercise of a discretionary power is legally unreasonable where the reasons demonstrated a justification (Singh at [45]–[47]).*

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611

6. *In Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611, Crennan and Bell JJ., observed at [135] the following.*

135 ... A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn.

Minister for Immigration and Citizenship v SZRKT (2013) 212 FCR 99

7. *In Minister for Immigration and Citizenship v SZRKT (2013) 212 FCR 99, Robertson J., at [96] held that a failure to consider evidence can constitute a failure to consider a relevant matter and amount to jurisdictional error where the material is central to the assessment of the visa applicant's claim. As the Full Court in Minister for Immigration and Border Protection v MZYTS explained at [68]:*

In SZJSS at [27]–[28] (a passage extracted by Robertson J in SZRKT at [96] the joint judgment of the Court recognised as a proposition flowing from Yusuf that “jurisdictional error may include ignoring relevant material in a way that affects the exercise of a power”. In this passage, the Court is not dealing with relevant considerations in the Peko-Wallsend sense. Rather, as we consider Robertson J recognised in SZRKT (at [97]), it is describing an example of jurisdictional error where, in a given case, ignoring relevant material demonstrated a failure to perform the statutory task cast upon it by the combined provisions in the

Migration Act because of the nature of the claims made and the nature of the material ignored.

Khan v Minister for Immigration and Ethnic Affairs (1987) 14 ALD 291

8. *In Khan v Minister for Immigration and Ethnic Affairs (1987) 14 ALD 291, Gummow J., observed at page 6, line 5 the following.*

What was required of the decision-maker, in respect of each of the applications, was that in considering all relevant material placed before him, he give proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy: Howells v Nagrad Nominees Pty Ltd (1982) 43 ALR 283 at 307; 66 FLR 169 at 195, Kioa (above) at CLR 604; ALR 361, Chumbairux v Minister for Immigration and Ethnic Affairs (1987) 74 ALR 480 at 492–4 (Chumbairux).... The assertion by a decision-maker that he has acted in this fashion will not necessarily conclude the matter; the question will remain whether the merits have been given consideration in any real sense: Turner v Minister for Immigration and Ethnic Affairs (1981) 35 ALR 388 at 392; 4 ALD 237 at 241, Chumbairux at 495–6.

I bear very much in mind the limited role of a court reviewing the exercise of an administrative discretion: Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 40–1; 66 ALR 299 at 309–10 per Mason J. It is not for the court to study administrative decisions too finely or precisely; they are to be regarded carefully but sensibly, and not zealously in the pursuit of error: Smith v Minister for Immigration and Ethnic Affairs (1984) 53 ALR 551 at 554 per Lockhart J. Nevertheless, in my opinion, on the whole of the evidence, the applications in question were

SZVAP v Minister for Immigration & Border Protection [2015] FCA 1089

9. *It is established that adverse credibility findings may involve jurisdictional error where they deny an applicant procedural fairness or are made on an illogical or unreasonable basis, SZVAP v Minister for Immigration & Border Protection [2015] FCA 1089; (2015) 233 FCR 451; (2015) 67 AAR 376 at [20]–[21] per Flick J. That is, the error must be one going essentially to the jurisdiction of the Tribunal: SZJEH v Minister for*

Immigration & Citizenship [2007] FCA 1706 at [17] per Jacobson J; SZSHV v Minister for Immigration & Border Protection [2014] FCA 253 at [27]–[31] per Flick J.”

56. (Errors in original)
57. Recently, the High Court of Australia considered the issue of legal unreasonableness in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 (see particularly Gageler J at [51]–[60].
58. It is common ground between the parties that the Review Applicant was required to satisfy the Tribunal both at the time of application and at the time of the Tribunal’s decision, that the Visa Applicant was the spouse or de facto partner of the Review Applicant. The Tribunal accepted that the parties were legally married on 12 October 2012 for the purposes of s.5F(2)(a) of the Act. However, the union must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the parties must live together or not live separately and apart on a permanent basis (see s.5F(2)(a)–(d) of the Act).
59. Regulation 1.15A(3) of the Regulations sets out various circumstances of the relationship to which the Tribunal must have regard. They are the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons’ commitment to each other.
60. The Review Applicant contends that the Tribunal erred in its consideration of each of those four factors.
61. The Review Applicant contends that in considering the **financial aspects** of the relationship, the Tribunal misapplied the relevant law, or its findings were affected by unreasonableness, or the Tribunal failed to give genuine, proper and realistic consideration to the financial aspects of the relationship.
62. The Tribunal noted the parties’ claim to have been living together at the home of the Review Applicant in a de facto relationship from 2005 to 2009 and to have dated for a few years prior to 2005. The Tribunal also noted that when the Visa Applicant left Australia for Colombia in mid-2012, the parties were not in a relationship; however, if the Visa

Applicant could obtain a divorce from his first wife, the Tribunal noted that the parties said they intended to marry. The Tribunal then noted the Review Applicant's evidence that the Visa Applicant proposed to her in August 2012 and finalised his divorce from his first wife on 9 October 2012. Thereafter, the Visa Applicant married the Review Applicant on 12 October 2012. The Tribunal noted that at the time of application the parties had been married for three months and had spent three days together in Chile as a married couple.

63. The Tribunal found that it was not satisfied that at the time of application, the parties had established a financial relationship that would be expected in the circumstances, given the length of the claimed relationship.
64. The Tribunal noted that the Department had not been satisfied that the parties had any joint ownership of assets or any joint financial liabilities, despite the parties claiming that they had been in a relationship for most of the time from 2002 to 2009 and to have lived together in the Review Applicant's home from 2005 to 2009. The Tribunal noted that between 2009 and 2012, although the parties shared the same house, they did so as friends. The Tribunal noted the parties' claims that they shared bills occasionally and bought household items together, but also noted that no receipts were provided in support of those claims. The Tribunal found that it was reasonable to expect that at the time of application there would be substantial information available to be provided that they had joint financial arrangements commensurate with what might be expected of a de facto couple.
65. In particular, the Tribunal noted a copy of the Settlement Adjustment Sheet for the sale of a property purchased from the Review Applicant, dated 31 August 2012. The Tribunal noted that the property was in the name of the Review Applicant only, and that the settlement monies were paid to her. The Tribunal found that that document did not add any weight to joint financial arrangements at the time of application, as it was not in joint names.
66. The Tribunal also noted that at the hearing the Review Applicant said she had savings of about \$50,000 and the Visa Applicant had no savings; whereas the Visa Applicant said that he had no money but thought that his wife, the Review Applicant, had about \$120,000 and

that they planned to buy a house together and use her money as a deposit. The Tribunal noted that no documentary evidence had been provided to confirm either of the parties' estimates. In the circumstances, the Tribunal was not satisfied that the parties ever had an open and detailed discussion about the financial situation of the Review Applicant and about their future financial plans.

67. The Review Applicant submits that an explanation for the parties' failure to provide any historical joint financial statements was because the Visa Applicant had remained married until 2012.
68. In relation to the Settlement Adjustment Sheet, the Review Applicant submitted that the Tribunal was incorrect to conclude that it did not add any weight to the joint financial arrangements at the time of application because the property was not in joint names. The Review Applicant also cavilled with the Tribunal's finding that there was no documentary evidence provided to confirm either of the parties' estimates of the savings of the Review Applicant. The Review Applicant simply asserts "*this was plainly wrong*", without explaining how, or why, or what the evidence was.
69. The Tribunal's findings were open to it on the evidence and material before it and for the reasons it gave. I do not accept the Review Applicant's submission that the Tribunal failed to give genuine, proper or realistic consideration to the financial aspects of the relationship. The Tribunal went into some detail to consider the Review Applicant's claims in relation to financial considerations and provided reasons why they led the Tribunal not to be satisfied that the parties had established a financial relationship that would be expected in the circumstances, given the length of the claimed relationship.
70. The Tribunal's findings in relation to the financial considerations were legally reasonable and were not without an intelligible justification. The Tribunal gave genuine, proper and realistic consideration to the financial aspects of the relationship and made findings accordingly that were open on the evidence and material before it. Unreasonableness is where a decision-maker has come to a conclusion so unreasonable that no reasonable decision-maker could have come to it (see *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225 ("*Li*") at [28] per French CJ), or where a decision has been made that lacks an

“evident and intelligible justification” (see *Li* at [76]; *Associated Provincial Picture House Limited v Wednesbury Corporation* [1949] 1 KB 223 at [234]). The test for unreasonableness is *“stringent”* and only arises in rare cases. Unreasonableness is not a means for challenging a decision on the basis that the court disagrees with the consideration of matters or the evaluative judgments made by the decision maker (see *Li* at [30], [113]).

71. In relation to the **social aspects** and commitment of the parties to each other, the Review Applicant submitted that the Tribunal misapplied the relevant law, that its findings were affected by unreasonableness, or that the Tribunal failed to give genuine, proper or realistic consideration to the claims of the Review and Visa Applicants, with regard to the social aspects of the relationship and their commitment to each other.
72. The Tribunal found the statements by the parties as to when they claimed to have first met in 2002 not to contain sufficient details, including lack of dates of events. However, the Tribunal noted that a friend of the Review Applicant said that she was present when the parties met in 2002, and swore a statutory declaration to that effect. However, the Tribunal found that no further information had been provided to address the Department’s concern about the lack of detail surrounding the meeting of the parties and when they say their relationship started.
73. The Tribunal noted that at the time of application the Visa Applicant and Review Applicant provided various photographs, statutory declarations, cards from each of the parties in 2006 and personal statements from each of the parties.
74. The Tribunal found that the four statutory declarations provided at the time of application provided support for the relationship up to 2009 and noted that they attested to the Visa Applicant and Review Applicant now being genuinely married and happy. However, the Tribunal found that none of these persons mentioned or addressed the period between which the parties on their own evidence say they were not in a de facto relationship, namely, from 2009 to 2012. That is the period immediately preceding the departure of the Visa Applicant from Australia and their marriage a few months later in October 2012.

75. Based on the evidence before it, the Tribunal found that either the declarants did not know about the parties' two year separation when they were not in a relationship other than claiming still to be friends, or simply chose not to mention it. Moreover, the Tribunal found that if the declarants were good friends or family of the Review Applicant, then they would know that she was in a relationship with another man from 2010 to 2012, on the evidence of the parties, and therefore not in a relationship with the Visa Applicant during that period.
76. In light of that evidence, the Tribunal placed limited weight on the statutory declarations, as they lacked detail and specific information and dates about when the parties were in a relationship.
77. The Tribunal accepted that the photographs submitted by the Review Applicant and Visa Applicant showed the parties in a social context but found that that evidence did not add weight to the claim that the parties were in a relationship at the time of application. The Tribunal found that at the time of application, the parties had spent about 6 weeks together in person when the Review Applicant travelled to Colombia and Chile. The Tribunal accepted that two of the Review Applicant's friends travelled to Colombia and Chile to attend the wedding on 12 October 2012.
78. The Tribunal also noted information and documents provided at the first Tribunal hearing, including *Viber* communications that it accepted as evidence that the parties had been in communication with each other.
79. The Tribunal then identified with specificity the nature of the material provided prior to the hearing on 12 September 2016, together with submissions. However, the Tribunal found that the submissions and attachments, received on 7 September 2016, provided little, if any, additional information that was relevant to or supported the social aspects of the relationship at the time of application.
80. The Tribunal then noted that further documents were provided to it prior to the second hearing on 6 October 2016. That material included sworn statutory declarations which the Tribunal identified with specificity, including a summary of the contents of the declarations.

81. Ultimately, the Tribunal found on the evidence before it that for the period 2009 to 2012, before the Visa Applicant left Australia, the parties declared themselves to family and friends as friends only, but not as being de facto partners. The Tribunal found that at the time of application there was little evidence provided to support the parties' claim that they had presented themselves socially to other people as being in a married relationship since the time of their engagement, other than some photos of a wedding that was only attended by a few people and statements of two friends who attended the wedding, together with the statements of the Review Applicant and Visa Applicant. The Tribunal found these statutory declarations in support of the relationship to be non-specific with regard to the times the parties were or were not in a de facto relationship between 2002 and 2012. The Tribunal noted that on the parties own evidence they had separated in 2009 but that none of the declarants referred to this, other than the Review Applicant's mother.
82. The Tribunal found that there was little, if any, evidence that the parties were in a relationship for the two years before the Visa Applicant left Australia, and again noted that the parties did not claim to have been in a relationship at that time, other than one of friendship. The Tribunal noted that the parties themselves and witnesses at the hearings gave oral evidence that the Review Applicant was in a relationship with someone else other than the Visa Applicant from 2009 to 2012. Further, on the evidence before the Tribunal, the Visa Applicant was still married when he left Australia in June 2012.
83. As stated above, the Tribunal found that it was only after the Visa Applicant was back in Colombia that the parties became engaged when they say the Visa Applicant proposed in August 2012. The Tribunal found that that was insufficient evidence to satisfy it that the parties had declared that they were in a committed and exclusive relationship, that they viewed as long term.
84. The Tribunal found that at the time of application the parties were "*very good friends*", but did not accept that the parties had, at that time, demonstrated that they were committed to a shared life together to the exclusion of all others.

85. Further, the Tribunal was not satisfied that the relationship at the time of application was genuine and continuing. The Tribunal noted that when the parties married in 2012, they sought to rely on the previous claimed cohabitation from 2005 to 2009 as evidence that they were in a genuine and continuing relationship in 2012. However, the Tribunal found that at the time of application, the parties had not provided any reliable evidence that they were in a genuine and continuing relationship when the Visa Applicant departed Australia on 4 June 2012.
86. For those reasons, the Tribunal found that the relationship that commenced in 2012 when the parties became engaged was not a continuing relationship from the earlier claimed relationship which ended in 2009.
87. The Tribunal found that the evidence provided to support the social aspects of the relationship consisted mainly of evidence of the relationship from 2005 to 2009, except for the evidence of the two friends who attended the marriage ceremony in Chile. Accordingly, the Tribunal was not satisfied that the relationship satisfied s.5F of the Act at the time of application.
88. Again, the Review Applicant submitted, by way of bare assertion that the Tribunal had “*erred in its findings*” in relation to its consideration of the social aspects of the relationship and the parties’ commitment to each other. The Review Applicant does not explain why. The Tribunal was not obliged to accept blindly all evidence provided by the parties. The Tribunal clearly found that the only evidence supporting the relationship after 2012 was of the two friends who attended the wedding. Their wedding was in the face of a large volume of material and evidence that went to supporting the relationship up until 2009.
89. In the circumstances, the Tribunal’s findings were open to it on the evidence and material before it and for the reasons it gave. The Tribunal’s findings were neither legally unreasonable, nor without an intelligible justification.
90. The Tribunal did not misapply the law and gave genuine, proper and realistic consideration of the parties. The Tribunal’s decision record makes clear that the Tribunal considered in great detail all the evidence

provided to it by the parties. Ultimately, it was not satisfied that was sufficient. As stated above, that finding was open to the Tribunal on the evidence and material before it and for the reasons it gave.

91. In relation to the **nature of the household**, the Review Applicant submitted that there was an insufficient logical or evidentiary basis for the Tribunal to find that at the time of application the parties had not provided enough evidence that they were in any relationship between 2009 to 2011; and erred by finding that at the time of application the parties were not in a married relationship that satisfied s.5F of the Act.
92. The Tribunal found that at the time of application the Visa Applicant and Review Applicant had provided little evidence of substance that they were living together as a couple or sharing the responsibilities of a household. The Tribunal referred to the statements and statutory declaration provided by the Visa and Review Applicants and referred to above in support of the parties' assertion that they had lived together from 2005 to 2009 and the Tribunal gave some weight to those statements in support of the shared household from 2005 to 2009.
93. However, the Tribunal found that no further information was provided to the Tribunal in the form of documentary evidence that the parties had established a household at the time of application, beyond their evidence of doing things together such as cooking and cleaning.
94. Again, the Tribunal's findings were open to it on the evidence and material before it and for the reasons it gave. They were neither legally unreasonable, nor lacking an evidentiary foundation. In considering the nature of the household the Tribunal clearly had regard to its earlier findings in considering the financial and social aspects of the relationship.
95. In the circumstances there was a sufficient logical and evidentiary basis for the Tribunal's finding that at the time of application the parties were not in a married relationship that satisfied s.5F of the Act.
96. Accordingly, Ground 1 is not made out.

Conclusion

97. A fair reading of the Tribunal's decision record makes clear that the Tribunal understood the claims being made by the Review Applicant; explored those claims with the Review Applicant at a hearing; and, had regard to all material provided in support. The Tribunal put to the Review Applicant matters of concern it had about her evidence and noted the Review Applicant's responses.
98. The Tribunal then made findings based on the evidence and material before it. Those findings of fact were open to the Tribunal on the evidence and material before it and for the reasons it gave. A fair reading of the Tribunal's decision record makes clear that the Tribunal reached conclusions based on the findings made by it and to which it applied the correct law.
99. In the circumstances, the Tribunal complied with its obligations under the statutory regime in the making of its decision, including the conduct of its review.
100. The Tribunal's decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act, this Court has no power to interfere.
101. The proceeding before this Court should be dismissed with costs.

I certify that the preceding ninety-nine (99) paragraphs are a true copy of the reasons for judgment of Judge Emmett

Date: 16 August 2018